

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA, | : | 21CR80(AMD) |
| Plaintiff, | : | |
| -against- | : | United States Courthouse |
| DOUGLASS MACKEY, | : | Brooklyn, New York |
| Defendant. | : | Wednesday, October 18, 2023 |
| | : | 11:30 a.m. |

TRANSCRIPT OF CRIMINAL CAUSE FOR A SENTENCING
BEFORE THE HONORABLE ANN M. DONNELLY
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Proceedings recorded by mechanical stenography, transcript produced by Computer-Aided Transcription

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1 (In open court.)

2 (The Hon. Ann M. Donnelly, presiding.)

3 (Defendant present.)

4 THE COURTROOM DEPUTY: This is criminal cause for
5 sentencing, Docket Number 21-CR-80, *USA versus Douglass*
6 *Mackey.*

7 Counsel, state your appearance, government first.

8 MR. PAULSEN: Good morning, Your Honor. Erik
9 Paulsen for the United States Government. I'm joined at
10 counsel table by Turner Buford, Bill Gullotta and also Erica
11 Vest from Probation.

12 THE COURT: Good morning.

13 MR. FRISCH: For Mr. Mackey, Andrew Frisch. Good
14 morning.

15 THE COURT: Good morning, Mr. Frisch.

16 Good morning, Mr. Mackey.

17 Mr. Frisch, we got your communication this morning
18 that Mr. Mackey's wife had a baby last night. I certainly
19 would have adjourned this proceeding if you wanted me to.

20 MR. FRISCH: I appreciate that. As I advised the
21 Court, and I wanted to give you a heads up to know about it as
22 opposed to telling you on the bench, she had an emergency
23 C-section last night. Everyone is fine as far as I know.
24 However, we're prepared to proceed today.

25 THE COURT: I understand that she's on the phone as

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1 well as Mr. Mackey's mother; is that correct?

2 MR. FRISCH: That's my understanding.

3 THE COURT: Can both Mrs. Mackeys, can everybody
4 hear?

5 MS. MACKEY: Good morning this is Kathy Mackey. I'm
6 having a hard time hearing you. His wife was not able to join
7 us.

8 THE COURT: Okay. And I am going to ask you to mute
9 if you could okay?

10 MS. MACKEY: Okay.

11 THE COURT: This is a sentencing proceeding.

12 Mr. Mackey was convicted after a jury trial of the sole count
13 of the indictment which charges that between September and
14 November of 2016, he, together with others, conspired to
15 injure, oppress, threaten or intimidate one or more people in
16 the free exercise and enjoyment of a right and privilege
17 secured to them by the Constitution and laws of the United
18 States, specifically the right to vote.

19 I'm going to go over the materials that I reviewed
20 in preparation for today's proceeding. Obviously I presided
21 over the trial, but also in connection with the trial and in
22 connection with today's proceeding, I reviewed Justice
23 Garaufis's opinions on various matters. I've also re-reviewed
24 the trial transcripts as well as the exhibits that were
25 introduced.

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1 I've reviewed the presentence investigation report,
2 the one from September 8th of 2023. That included a
3 sentencing recommendation. I've also reviewed the addendum to
4 the presentence investigation report of October 5th of 2023,
5 and their revised sentencing recommendation from October 6th
6 and I just want to double check that everybody received those
7 sentencing recommendations; is that correct?

8 MR. PAULSEN: Yes, Your Honor.

9 MR. FRISCH: Yes.

10 THE COURT: Okay. Probation is recommending a
11 sentence of ten months custody with two years of supervised
12 release and some special conditions. They are obviously
13 recommending the \$100 special assessment and that Mr. Mackey
14 be excused from mandatory drug testing. I've reviewed the
15 Government's objections to the presentence investigation
16 report, the defendant's objections to the presentence report.
17 Then there was an additional amendment to the objections that
18 was submitted on September 23rd. The Government's reply to
19 those objections and then the defendant's sentencing
20 memorandum and the exhibits from September 26th; the
21 government's sentencing memorandum from October 3rd, as well
22 as Mr. Frisch's two supplemental submissions that were
23 submitted on October 12th.

24 Is that -- have I missed anything? Let me as the
25 Government.

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1 MR. PAULSEN: I don't believe so, Your Honor.

2 THE COURT: Mr. Frisch?

3 MR. FRISCH: I don't believe so.

4 THE COURT: Mr. Frisch, have you and Mr. Mackey read
5 and discussed the presentence report?

6 MR. FRISCH: Yes.

7 THE COURT: I am going to go through the calculation
8 of the advisory guidelines range as I'm required to do.
9 Probation calculates the total offense level as 12. There's a
10 base offense level of 12 and Probation does not identify any
11 adjustments. So the adjusted offense level is also 12. The
12 defendant has a criminal history score of zero which
13 corresponds to a criminal history category one for a total
14 offense level of 12 and a criminal history category of one.
15 The guideline range is ten to sixteen months.

16 Both the Government and the defendant ask that I
17 incorporate the anticipated guidelines reduction, which is
18 scheduled to take effect next month, actually in a couple of
19 weeks, which is a reduction for zero-point offenders. That
20 reduction, if applied, would take two points off and result in
21 a total offense level of 10, which lowers the guideline range
22 to six to 12 months. I am going to apply that reduction
23 because Mr. Mackey would be entitled to it if he were
24 sentenced in a few weeks and it's a reduction that I've been
25 routinely applying to defendant's who appear before me for

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1 sentencing who fall within that category. But a sentence
2 within this range because the guidelines are not yet in effect
3 is treated as a variance.

4 I'm going to go over the objections to the
5 guidelines calculations. First, Mr. Frisch objects that or
6 contends that Mr. Mackey is entitled to a two-point downward
7 adjustment because he had what is characterized as a minor
8 role in this conspiracy, citing that he wasn't present in the
9 chats when people discussed and formulated the false memes
10 that are in question and the only contact that he had with the
11 co-conspirators was in the context of these chats and because
12 he didn't actually create the memes himself or direct them.

13 I agree with Probation that the downward adjustment
14 is not applicable. The downward adjustment for a minor role
15 is not applicable on these facts. I don't think looking at
16 the evidence at trial that the defendant's role in this
17 conspiracy could in any way, shape or form be characterized as
18 minor.

19 The evidence showed that he understood the scope and
20 structure of the conspiracy and that he was one of the leading
21 and most influential members of the conspiracy because of the
22 wide reach of his influence on Twitter. And it was this very
23 prominence on Twitter, the status about which he boasted and
24 of which he was proud, that enabled the conspiracy's
25 disinformation to spread. I think one of the witnesses

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1 testified "like wild fire."

2 So it was -- his participation in achieving the
3 conspiracy's goals of lowering the turnout among certain
4 voters was significant and it was potentially more effective
5 because of his influence on Twitter. He -- I think I said
6 enough about it, but he was dispensing advice on how to make
7 effective memes and was a leader in the conspiracy. So I
8 agree with Probation that the two-point downward adjustment is
9 not applicable.

10 There is also a request -- the defendant also
11 requests that he get a downward departure on the theory that
12 his behavior was aberrant. This is the -- under the
13 guidelines a downward departure in situations where, you know,
14 there's a momentary lapse or there was a single criminal
15 transaction in cases and it's akin to the analysis for the
16 minor adjustment, but this case under its facts is not about
17 minor lapses or momentary lapses in judgment.

18 I know the characterization of Mr. Mackey's conduct
19 is "two clicks," but that's not a fair characterization in my
20 view of what the case was at all. This was a conspiracy that
21 took place over a series of months and intensified in the
22 lead-up to the presidential election so a downward departure
23 for aberrant behavior in my view is not appropriate.

24 I want to note some of the other objections to the
25 presentence investigation report. Mr. Frisch objects to the

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1 description of the offense and the offense conduct portion of
2 the presentence report. I agree with Probation that the
3 offense conduct is accurately described and I'm not going to
4 change anything about that.

5 There is also an objection to Probation's statement
6 that Mr. Mackey hasn't accepted responsibility. Obviously
7 he's gone to trial and is planning to challenge his conviction
8 on appeal, as is his right, but I think as a factual matter he
9 hasn't accepted responsibility, but obviously I recognize his
10 right to assert his innocence. I'm not changing the
11 presentence report. I'm accepting it as amended by the
12 addendum to the presentence investigation report.

13 I will say, though, I don't think there's any need
14 to discuss this further, I'm not going to be imposing those
15 internet restrictions. I think both sides agree that those
16 are not appropriate in this case, and so those will -- I'm not
17 imposing those unless somebody else wants to talk about that
18 further.

19 I have reviewed carefully really everything about
20 this case including the parties' submissions, but I will hear
21 from you further if you wish to say anything else.
22 Mr. Frisch, I will hear from you first and then from the
23 Government and then if Mr. Mackey wants to say anything, I
24 will hear from him as well as well.

25 I will remind everybody to speak into the microphone

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1 and not speak too quickly.

2 Mr. Frisch, anything else you would like to add
3 to --

4 And I also want to say that the submissions were
5 extremely thorough from both sides.

6 MR. FRISCH: Your Honor, thank you. Forgive me, I'm
7 getting over a long-lasting cold. I just want to make sure
8 that the objection in my letter of September 22nd to paragraph
9 40 is reflected. I don't recall if Officer Vest reflected
10 this in one of her addenda, but it's just a factual question
11 as to --

12 THE COURT: Tell me what page that's on.

13 MR. FRISCH: It's at paragraph 40 of the PSR.

14 THE COURT: So it's page eight?

15 MR. FRISCH: Let me see.

16 THE COURT: No, page nine.

17 MR. FRISCH: And in my letter, I pointed out that or
18 I asked that the paragraph be amended to note that Mr. Mackey
19 moved from Brooklyn to Manhattan in 2012 and left his job the
20 Dunham & Associates in Brooklyn in June of 2016.

21 THE COURT: I thought you added that, no.

22 MS. VEST: Your Honor, on page two of the addendum,
23 the fourth paragraph down, it does make the amendment to the
24 PSR incorporating that information.

25 MR. FRISCH: Excellent.

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1 THE COURT: Okay.

2 MR. FRISCH: Your Honor, if I can talk a little bit
3 this morning about why any prison under the circumstances of
4 this case is greater than necessary to achieve the statutory
5 goals of sentencing, why a noncustodial sentence, perhaps,
6 including community service, is sufficient within the meaning
7 of the statute and there's a number of reasons and I'll go
8 through them and I ask that they be considered separately, but
9 also together.

10 We know from the government that prison is not
11 necessary is not necessary to deter generally this kind of
12 conduct. What do I mean? According to the Government's
13 evidence, when Tia, T-I-A, when Tia reported to Mr. Microchip
14 that she had been suspended from Twitter for posing one of
15 these memes, Mr. Microchip said, quote, I guess don't post
16 those then, close quote. And that was early morning of
17 Election Day 2016. So even as the goal of the conspiracy as
18 charged by the Government was about to be realized, suspension
19 of Twitter was sufficient to stop these memes.

20 Whatever the circuit may have to say about
21 Mr. Mackey, Mr. Gulotta presentation of Mr. Microchip
22 established that his fear of disclosure of his identity
23 significantly contributed to resolution of a prospective
24 charge against him. Just fear of disclosure, disclosure of
25 his identity, was sufficient. And we know that Mr. Mackey

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1 took the unusual step three years before his arrest to check
2 himself to check himself in for inpatient psychotherapy and
3 genuine self-correction just because his identity was made
4 public.

5 THE COURT: I'm sorry to interrupt you, but can you
6 elaborate? Was there a diagnosis? I thought there was -- is
7 there a report or something from that facility?

8 MR. FRISCH: I did not submit a report from the
9 facility. My understanding, as consistent with the
10 pre-sentence report, it was a course of psychotherapy and very
11 intense counseling to address what Mr. Mackey believed was a
12 need to get his life on the right track essentially and was so
13 serious about it that he did it inpatient.

14 THE COURT: But was -- and I just -- it's connected
15 to the doxing; is that correct?

16 MR. FRISCH: That was the impetus for him to realize
17 that he needed to correct himself, that he needed help.

18 THE COURT: And was there a diagnosis -- I mean,
19 typically if you're going to check yourself in and I'm not a
20 professional, but was there a particular condition that this
21 was supposed to address?

22 MR. FRISCH: Can I have one moment?

23 THE COURT: Sure.

24 (Pause in proceedings.)

25 MR. FRISCH: Thank you, Judge. My understanding was

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1 there was no diagnosis in a formal sense in the way that
2 sometimes psychotherapists or counselors identify a particular
3 disorder or a particular condition. It was more of addressing
4 what Mr. Mackey perceived to be the need for help with his
5 general life stuff, and general counseling and to do it in a
6 way that was intensive; that is, not one or two hours a week
7 but to go someplace where he could have the benefit of an
8 environment most conducive to essentially general
9 psychotherapy. That's my understanding.

10 THE COURT: Okay. Go ahead. I'm sorry to
11 interrupt.

12 MR. FRISCH: So, for these reasons, the record
13 establishes that prison is not necessary, even for general
14 deterrence, because the folks that were doing this were
15 deterred by things before the government intervened and
16 certainly short of prison.

17 Second, in panel discussions within this courthouse,
18 in seminars, in public commentary and law reviews, as a
19 community we bemoan the focus on prison that is peculiar among
20 western nations. But all of those concerns tend to fall by
21 the wayside when we appear for actual sentencing. Most of
22 the time, virtually all the time, the Government can theorize,
23 well, prison is necessary in this case for a particular reason
24 or not and what we talk about outside of courtrooms at
25 sentencing really isn't addressed, but it's hard to think of a

1 case or circumstances more -- making prison more unworthy as
2 here. It isn't that we can't theorize that prison could
3 provide -- could advance the statutory goals of sentencing,
4 but it's hard to find a case that where prison seems not to be
5 something we must impose to paraphrase the statutory command.

6 The Government did not prosecute Mr. Mackey because
7 he formulated the memes or orchestrated anything. The
8 Government prosecuted him over the past three years, not so
9 much to deter what was already deterred before and without
10 government intervention, but to make a point. And there's
11 nothing about prison that necessarily would be required under
12 our circumstances to further make that point.

13 The Government says, well, Mr. Mackey has not
14 accepted responsibility, that his voluntary introspection,
15 self-correction, even three years before his arrest, his
16 idiosyncratic or at least it's no -- it doesn't obviate the
17 need to impose prison, but I think there are features of this
18 case that distinguish it. The quantum of evidence in the
19 lion's share of federal criminal cases, maybe all of them or
20 virtually all of them, but certainly the lion's share proves
21 guilt to or close to a certainty. It doesn't have to, but
22 invariably it does. There's, for example, a robbery on a
23 surveillance video or there's an undercover drug transaction
24 or there are wiretaps or there's multiple investors relying on
25 the same misrepresentation, and more; the lion's share of

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1 federal criminal cases prove some actual harm, not all of
2 them, but the lion's share narcotics bought and sold assets
3 stolen by force or by fraud, death, physical injury,
4 contraband is seized.

5 In these ways, this case is different from the
6 lion's share of federal criminal cases. Now, to prove a
7 legally sufficient case, proof to a certainty is not required,
8 nor should it be and to prove a legally sufficient case of
9 conspiracy, proof of harm or reliance is not required, nor
10 should it be. But finding legal sufficiency is a different
11 exercise than imposing prison. Finding that our protocols for
12 fact finding establish legal sufficiency does not establish
13 that prison must follow. The parsimony clause, our
14 longstanding and traditional national reverence for liberty,
15 required by statutory command establishes an institutional
16 reluctance to impose prison, a humility about it. It's not
17 the default. The default is no prison.

18 Prison is the exception when we must, when it's
19 necessary. None of us can purport to know with any degree of
20 certainty what Mr. Mackey was thinking of November 1st, seven
21 years ago; not the Government, not the jurors. We do the best
22 we can to determine if someone formed criminal intent at the
23 time of action and we indulge less than certainty to sustain
24 legal sufficiency as we must and we bring to that process all
25 of our imperfections and frailties and maybe that's okay when

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1 it comes to establishing legal sufficiency but we have to
2 think of it different when we decide whether we must impose
3 prison.

4 In fact, the standards are the opposite. The
5 standard for legal sufficiency is to indulge all the
6 government inferences, but for prison it's whether we must do
7 it; whether the circumstances compel it. It's dangerous for
8 the state to be so confident that it knows what someone was
9 thinking at a point in time that not only would we find
10 legally sufficient evidence to sustain a conviction but more
11 to vindicate -- and to vindicate a purported statutory command
12 defining a crime, but in addition, we're going to impose
13 prison; so certain are we that we know exactly what you were
14 thinking accommodating the Government's inferences of guilt
15 does not mean that we accommodate inferences that prison is
16 necessary. It is and should be a different analysis.

17 Ricky Vaughn disappeared years ago, years before
18 Mr. Mackey's arrest. Doug Mackey over the past years has done
19 everything right, everything just as he should have. Letters
20 submitted to the Court describe him and these are quotes: A
21 man of faith and integrity deeply committed to a life of
22 service to others. He holds himself to a high standard
23 ethically, morally and conscientiously. A person of
24 unwavering honesty and a strong moral compass who consistently
25 goes above and beyond to help those in need, demonstrating

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1 dedication to making our community a better place. Those are
2 quotes, many of them from people who Mr. Mackey met in the
3 church as he's rededicated his faith to the church and as a
4 result of the inpatient counseling that he had.

5 The Court today is sentencing someone who
6 self-corrected on his own before and without government
7 intervention. We know that suspension from Twitter, the
8 disclosure of identity, was sufficient to deter these means
9 and even if there remains some theoretical basis to believe
10 that prison is necessary, the arguments against it
11 substantially and compellingly outweigh the reasons for it.
12 And I will end with this thought: It is a juror, one of the
13 jurors who wrote to the Court that a sentence of community
14 service in his -- in her view, would be sufficient, and I
15 believe she's right.

16 THE COURT: All right. Thank you so much
17 Mr. Frisch.

18 Mr. Paulsen.

19 MR. PAULSEN: Thank you, Your Honor. The Government
20 agrees with Probation that a guidelines term of incarceration
21 is the proper sentence in this case. I don't want to belabor
22 the points that we've made in our submission as I know Your
23 Honor has read it, but I would like to emphasize the one
24 consideration that we think is especially important and that's
25 the need for general deterrence, particularly for conduct

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1 affecting the very important right to vote.

2 As any number of courts have commented, including
3 the Supreme Court, voting is the right that secures all the
4 other rights that we hold dear as American citizens. The
5 conspirators in this case sought to undermine that very
6 important right. They wanted to trick people into casting
7 their votes in a way that wouldn't count, so the votes would
8 essentially disappear. And they did this during an election
9 season where voting results were expected to be very close, so
10 small numbers of votes wouldn't matter.

11 As the Court noted a moment ago, this plan wasn't
12 hatched on a whim. It was discussed and strategized for
13 several weeks in private groups where the defendant had been a
14 leading member. And it was executed using the methods the
15 defendant and his associates had honed and perfected
16 throughout the elections. There was nothing about this
17 conduct that was worthy of the protection accorded to other
18 political activities.

19 The defendant and his co-conspirators were not
20 engaging in political arguments or making a social critique or
21 contributing to the marketplace of political ideas. They were
22 just trying to injure the right to vote. They were committing
23 a fraud; one that was aimed at the most sacred rights
24 available in our democracy. Now, among the factors this court
25 will always consider in crafting an appropriate sentence is

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1 the need for deterrence. The Government submits that it may
2 be likely that the defendant is not going to commit this
3 particular crime again.

4 While the defendant has been evasive about his
5 current online activities, he appears to have withdrawn from
6 social media after his doxing and the reckoning it has caused
7 in his personal life. The defendant may be right; specific
8 deterrence does not weigh very heavily here. General
9 deterrence, however, is an entirely different matter. We
10 submit that the need for general deterrence in this case is
11 absolutely paramount.

12 The sentence this court imposes today is going to
13 send a message to the general public. It's going to send a
14 message to the people that celebrated what the defendant did
15 and send a message to people considering following in his
16 footsteps. It's going to send a message to everyone out there
17 willing to undermine the right to vote. The sentence you
18 impose today is going to be all the more important given how
19 relatively easy it is to commit crimes like this anonymously.

20 The defendant has a case in point. Despite becoming
21 an internet celebrity and the intense object of interest of
22 various journalists, he was able to remain anonymous for
23 years. He used VPN and hid his real name. Others will no
24 doubt follow in this path and try to undermine voting rights
25 while taking advantage of the broad anonymity that the

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1 internet permits.

2 The sentence today needs to send a message to those
3 potential bad actors and the sentence today needs to let the
4 general public know that there will be significant
5 consequences for crossing that line and undermining the right
6 to vote. For these reasons as well as all the others we
7 outlined in our submission, Your Honor, the government submits
8 that a term of incarceration is essential here.

9 We submit that a sentence between six and twelve
10 months, as recommended by the guidelines, would be sufficient
11 but not more than necessary to serve the purposes of
12 punishment and we ask that the Court impose such a sentence.

13 Thank you.

14 THE COURT: Thank you so much.

15 Mr. Mackey, you have a right to speak if you would
16 like to be heard.

17 THE DEFENDANT: No, thank you, Your Honor.

18 THE COURT: Thank you, so much.

19 Well, it is, to say the least, not an easy task to
20 impose a sentence on any human being because of what it means
21 for you, Mr. Mackey, and because of what it means for your
22 family. I do want to acknowledge your family, both your wife
23 and your mom, who are on the phone, your father and your
24 brother who have been here for every single day of these
25 proceedings. I watched as they came and supported you and it

1 must have been agonizing for them; first to learn about what
2 you had been doing which appears to have come as a complete
3 surprise and then to have to come here and watch their child
4 on trial in a criminal case in a federal courthouse. It is
5 one of the sad constants in criminal cases that innocent
6 people, like your parents, like your siblings and like your
7 wife and now your new baby, suffer because of your actions.

8 I also want to assure you that every judge in this
9 courthouse, including me, considers regularly whether prison
10 is an appropriate sentence. As a Court who presides over the
11 alternatives to incarceration, one of the programs in this
12 courthouse, I am keenly aware of the difficulties, to say the
13 least, faced by people who have a prison sentence and I, like
14 other courts, regularly conclude that prison is not necessary
15 even when a guideline sentence is high.

16 So, I want I want to begin by saying that the
17 starting point as it is in every case is determining the
18 guidelines, but although I have done that, the sentence I
19 impose today is the sentence I would have imposed regardless
20 of what the guidelines are.

21 In considering what the appropriate sentence is in
22 this case, I look to the statute Section 3553(a) factors and
23 the factors include that the Court consider the following
24 factors in determining a sentence that is -- that is
25 sufficient but not greater than necessary to meet the goals of

1 sentence. Those factors include the seriousness of the crime,
2 that the sentence show with respect for the law, that the
3 sentence be fair and just, that it act as a specific deterrent
4 to the defendant in front of me, as a general deterrent to
5 anyone else who would consider engaging in the same conduct,
6 to the extent the defendant needs rehabilitation, that's
7 another factor, and I also consider your history and your
8 background.

9 It is with these principles that I sentence you
10 today. I have given careful consideration to the arguments
11 that your very excellent lawyer has made in your defense.
12 I've read the letters submitted by your friends and family. I
13 want to be clear about what you are not being sentenced for
14 today. You are not being sentenced for your political beliefs
15 or for expressing those beliefs.

16 One of the foundational principles of our country,
17 of this democracy, is that people cannot be prosecuted for
18 their political beliefs or for expressing them. Each one of
19 us has the right to hold opinions and to express those
20 opinions. You have that right. You are not being prosecuted
21 for your support of a particular candidate. Citizens of this
22 country have the right to support the candidate of their
23 choice and to express their support. You have that right.
24 You are not being sentenced today for your beliefs or what
25 your beliefs might have been, of people of different

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1 backgrounds, different races or for your beliefs about women.
2 You are not being sentenced for expressing opinions about any
3 of those groups. Every person has the right to express his
4 opinion. Even when those views are repellent, you have that
5 right.

6 What you are being sentenced for is the offense for
7 which a unanimous jury found you guilty, and that is
8 conspiring with other people to injure, oppress, threaten or
9 intimidate one or more people in the free exercise and
10 enjoyment of a right or privilege secured to them by the
11 Constitution and the laws of the United States. That's the
12 right to vote.

13 It is one of the cornerstones of our democracy.
14 That's the right that you conspired with others to take and
15 unlike your expressions of political opinions, your actions in
16 connection with this conspiracy are not protected by the First
17 Amendment Judge Garaufis held, and he was correct, the
18 evidence bore this out that this case was about conspiracy and
19 injury, not speech. Speech was just the way that you and the
20 method that you used to commit this crime.

21 You're obviously a well-educated person and
22 intelligent but you used your considerable talent and skills
23 not to persuade other people to believe like you believe but
24 to try to take something precious from certain classes of
25 voters, voters who have the same right that you do, to vote

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1 for the candidate of their choice and to have that vote count.
2 You decided that certain voters didn't deserve that right;
3 either because of who they were, what they looked like or what
4 candidate they supported. The fact that you employed speech
5 in this conspiracy was only in the service of lies. It was
6 just a tool.

7 It's been said throughout the trial and suggested
8 today that nobody would have fallen for the scheme, for the
9 voting by text meme, but one of the people that I think was
10 one of your followers seemed to fall for it because at some
11 point on Twitter or on a chat the person said, Why don't we
12 get to do this." So, clearly somebody thought it would work
13 and Mr. Samiri (ph) from I-Vision who was the company that
14 least the short code was concerned that people might think
15 this was legitimate because it wouldn't be outside of the norm
16 for something like that to happen in the near future.

17 So, how to analyze this conduct in the framework of
18 the 3553(a) factors and the goals of sentencing. I want to
19 focus on a couple of those goals and the first is this
20 sentence has to reflect the seriousness of the crime. There's
21 no question that this is a serious crime. I think the
22 Government quoted *Westbury against Sanders* from the Supreme
23 Court, but in 1964 the Supreme Court said that, "No right is
24 more precious in a free country than that of having a voice in
25 the election of those who make the laws under which as good

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1 citizens we must live. Other rights, even the most basic, are
2 illusory if the right to vote is undermined."

3 Dr. Martin Luther King, in his *Give Us the Ballot*
4 speech said that, "The denial of this right, the sacred right
5 to vote, is a tragic betrayal of our democratic tradition and
6 it is democracy turned upside down. So long as I do not
7 firmly and irrevocably possess the right to vote, I do not
8 possess myself. I cannot make up my mind. It is made up for
9 me. I cannot live as a democratic citizen observing the laws
10 I have helped to enact. I can only submit to the edict of
11 others."

12 Conspiring to injure people in the free exercise of
13 the sacred right to vote is nothing short of an assault on our
14 democracy. The sentence has to reflect the seriousness of
15 that attempt. This crime, as Judge Garaufis expressed so
16 eloquently in his decision denying the motion to dismiss, has
17 taken many forms over the years. The method that you and your
18 co-conspirators employed was, perhaps, just as insidious and
19 perhaps even more cloaked in anonymity with the ability to
20 reach untold numbers of people all over the country using
21 familiar-seeming imagery to think people into thinking that
22 they could vote in a way that they couldn't vote, the
23 potential for depriving people of these basic rights is
24 staggering.

25 Another one of the 3553(a) factors is deterrence,

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1 general deterrence. This sentence must act to deter anyone
2 else who would do what you did. The sheer number of people
3 who were participating, and this shows that this is something
4 that people may seek to do again and it must be clear to
5 anybody else who would seek to do this, to steal someone's
6 fundamental right to vote, that there will be a consequence.
7 There's also a matter of specific deterrence and also in
8 connection with the need that the public is protected from
9 future crime.

10 You've testified that you've changed. That's what
11 you told the jury. You apologized to your family for saying
12 hateful things about different kinds of people. They were
13 entitled to that. Your lawyer has said and you testified at
14 trial that you suffered a great deal when you lost that cloak
15 of anonymity, when your identity was revealed and that you got
16 treatment for that. I have no doubt in my mind that that was
17 a very difficult time for you, but it's not clear to me that
18 that treatment was connected to the conduct at issue here.
19 Every judge in the sentencing proceeding wants to know as much
20 as possible about the person being sentenced so that I can
21 make sure that the sentence is in line with those goals of
22 sentencing.

23 But I realize that there's a lot that I don't know
24 about you. It's my observation is that you reveal what you
25 want to reveal. You've chosen not to reveal what you're doing

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1 now except for a sort of a vague label of anonymous political
2 commentary. I don't know what that means. I guess you're
3 entitled not to tell me what you do, but it makes it difficult
4 for me to be certain and confident that this is not something
5 that you will repeat in some other form.

6 So taking into account all of these factors a
7 non-incarceratory sentence would not serve the purposes of
8 sentencing. It would not reflect the seriousness of the
9 crime. It would not act as a deterrent either to you or other
10 people and I can't be certain that the public would not be
11 protected.

12 So, for that reason, I have concluded that a
13 sentence of seven months in prison with two years of
14 supervised release is the appropriate sentence. As I said
15 before, I decline to impose those conditions that Probation
16 sought. I don't think they were -- I understand the
17 rationale, but I think under these circumstances, unlike other
18 cases where those conditions are imposed, that there's too
19 great a risk of infringing on your First Amendment rights.
20 You will, however, have to cooperate with Probation and abide
21 by whatever conditions they impose.

22 I do want to address a request that has been made to
23 Probation twice, to the probation officer in this case. That
24 request was that if she learns where you are working and with
25 whom, that she withhold that information from the Court and

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1 instead notify your lawyer so that he can apply to the Second
2 Circuit. That is not an appropriate request. Probation is an
3 arm of the Court and you can't ask a Probation officer to keep
4 information from the Court. Probation records are sealed so
5 the information will not become public. In addition to the
6 seven months, I'm also imposing a \$15,000 fine. The record
7 reflects that you have an ability to pay and it is also
8 warranted by the circumstances of this case.

9 I am going to ask Probation Officer Vest to just --
10 typically we impose a payment schedule and I would just seek
11 your recommendation on that.

12 MS. VEST: Yes, Your Honor. So, the fine would be
13 due immediately. Our recommendation for a payment schedule
14 would be a rate of \$25 per quarter while the defendant is in
15 custody and a rate of 10 percent of gross monthly income while
16 on supervised release.

17 THE COURT: All right. Thank you.

18 I also do want to notify you of your right to
19 appeal. As your lawyer already knows, you must file a Notice
20 of Appeal within 14 days of the filing of the entry of a
21 judgment or within 14 days of the filing of a Notice of Appeal
22 by the Government. If you ask, the Clerk will prepare and
23 file a notice of appeal for you. If you can't afford to pay
24 for an appeal or for an appellate lawyer, you have the right
25 to apply for leave to appeal in forma pauperis. That means

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1 you can file to have the Court waive the filing fee. On
2 appeal, you can also apply for a court-appointed lawyer.

3 Now, I didn't get a response from the Government on
4 this question. Mr. Frisch has asked that I give him bond
5 pending appeal.

6 Do you have a position on that?

7 MR. PAULSEN: Yes, Your Honor. We oppose them.

8 THE COURT: Put your reasons on the record, but I
9 think I know them.

10 MR. FRISCH: So, the standard as interpreted by the
11 Second Circuit for bond pending appeal is whether there are
12 substantial and nonfrivolous issues and the purpose of the
13 appeal is for other than delay. There are many issues, as
14 we've discussed in pretrial and post-trial briefing, that are
15 novel, interesting, that are certainly not frivolous and are
16 substantial and create, in this case, a real possibility on
17 any one of a number of grounds of reversal.

18 We've litigated this and discussed this so much both
19 with Your Honor and with Judge Garaufis that I will not seek
20 to identify all of them today, but the highlights are venue,
21 the application of Section 241 to this conduct, the defense's
22 view of a significant Brady violation in this case and the
23 insufficiency of the evidence. Those are the ones that come
24 first to my mind. There may be others.

25 I think the issues in the nature of this case which

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1 is a first -- it's the first type of case predicated on this
2 type of conduct, should be subject to Appellate review and
3 Appellate resolution before we wind up with a situation where
4 Mr. Mackey has served his sentence before the Appellate court
5 can address it. So, for those reasons, we ask the Court to
6 stay the sentence pending appeal and to keep in place the
7 conditions release to which Mr. Mackey has been completely
8 compliant.

9 THE COURT: Mr. Paulsen?

10 MR. PAULSEN: Yes, Your Honor. Our reading of the
11 statute, 3143(b)(1), indicates that bail is granted in such
12 circumstances -- in extraordinary circumstances where it's not
13 for the purpose of delay, as the defendant noted, but it
14 raises a substantial question of law likely to result in
15 either reversal or an order for a new trial. While the memes
16 used by the defendant in this case were different than some of
17 the other cases. The established legal principles that Judge
18 Garaufis elucidated in his long opinion have been around for
19 100 years and our review of law is that this is not a case
20 where an appellate court is likely to disturb Judge Garaufis's
21 findings of the law nor find that the jury's decision was not
22 bounded in fact.

23 We do not believe these are the sort of
24 extraordinary circumstances where the Court should postpone
25 the defendant's sentence for what will likely be a lengthy

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1 appeal.

2 THE COURT: Well, I agree that the question -- first
3 of all, the statute, 18 U.S.C. Section 3143(b), permits the
4 Court to grant bail pending appeal and the applicable part of
5 that statute is -- is whether there is a substantial question
6 of law or fact that's likely to result in a reversal in order
7 for a new trial or for a non-incarceratory sentence or for a
8 reduced sentence. And a substantial question is a close
9 question or one that could very well be decided either way.

10 Having just rejected the Rule 29 and Rule 33 motions
11 and having carefully considered all of those arguments, I do
12 not believe this is one of those cases where bail pending
13 appeal is appropriate. Obviously you can go to the Second
14 Circuit and they may feel differently.

15 I will, however, permit Mr. Mackey to surrender and
16 I think probably sometime in January if that's a date that is
17 a time that is after the holidays.

18 MR. FRISCH: I'm thinking if that will give us
19 enough time, give the Circuit enough time to hear us and I
20 think the answer is if we need more time to apply for it then,
21 but I think January after the holidays is otherwise okay.

22 THE COURT: How is January 18th? One other thing I
23 neglected to do was impose the \$100 special assessment which
24 I'm doing.

25 Are there any other matters that need to be

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1 addressed?

2 MR. PAULSEN: No, Your Honor. There were no open
3 counts. Nothing further.

4 THE COURT: Mr. Frisch, anything else?

5 MR. FRISCH: Your Honor, if I can ask that Your
6 Honor recommend to the Bureau of Prisons that Mr. Mackey be
7 designated to the satellite camp in Miami as his first choice
8 and if that's not available the satellite camp in Pensacola,
9 Florida. As Your Honor knows, those are the two satellite
10 camps in the state of Florida as far as I know. As, Your
11 Honor knows, Mr. Mackey and his family live in Florida.

12 THE COURT: I can make that recommendation. Okay.
13 All right. Thank you so much, everybody.

14 MR. PAULSEN: Thank you, Your Honor.

15
16 (Matter adjourned.)

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